

determination by the contracting officer that—

(A) The services to be acquired are commercial services as defined in paragraph (6) of the definition of *commercial item* at FAR 2.101 (41 U.S.C. 103);

(B) If the services to be acquired are subject to FAR 15.403-1(c)(3)(ii), the offeror of the services has submitted sufficient information in accordance with that subsection;

(C) Such services are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and

(D) The use of a time-and-materials or labor-hour contract type is in the best interest of the Government.

[74 FR 34264, July 15, 2009, as amended at 74 FR 35826, July 21, 2009; 76 FR 21812, Apr. 19, 2011; 76 FR 58136, Sept. 20, 2011]

212.211 Technical data.

The DoD policy for acquiring technical data for commercial items is at 227.7102.

212.212 Computer software.

(1) Departments and agencies shall identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software in accordance with Section 803 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

(2) See Subpart 208.74 when acquiring commercial software or software maintenance. See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

[74 FR 34270, July 15, 2009]

212.270 Major weapon systems as commercial items.

The DoD policy for acquiring major weapon systems as commercial items is in Subpart 234.70.

[71 FR 58538, Oct. 4, 2006]

Subpart 212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) The following additional provisions and clauses apply to DoD solicitations and contracts for the acquisition of commercial items. If the offeror has completed the provisions listed in paragraph (f)(i) or (ii) of this section electronically as part of its annual representations and certifications at <https://orca.bpn.gov>, the contracting officer may consider this information instead of requiring the offeror to complete these provisions for a particular solicitation.

(i) Use one of the following provisions as prescribed in part 225:

(A) 252.225-7000, Buy American Act—Balance of Payments Program Certificate.

(B) 252.225-7020, Trade Agreements Certificate.

(C) 252.225-7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

(ii) Use the provision at 252.212-7000, Offeror Representations and Certifications—Commercial Items, in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.7603), indicate on an addendum that “The certification in paragraph (b) of the provision at 252.212-7000 does not apply to this solicitation.”

(iii) Use the clause at 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

(iv) Use the provisions and clauses prescribed elsewhere in DFARS as follows:

(A) Use the provision at 252.204-7011, Alternative Line Item Structure, as prescribed in 204.7109(b).

(B) Use the provision at 252.209-7001, Disclosure of Ownership or Control by

the Government of a Terrorist Country, as prescribed in 209.104–70(a).

(C) Use the clause at 252.211–7003, Item Identification and Valuation, as prescribed in 211.274–4.

(D) Use the clause at 252.211–7006, Radio Frequency Identification, as prescribed in 211.275–3.

(E) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003–5(b).

(F) Use the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402–4.

(G) Use the clause at 252.225–7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225–7040.

(H) Use the clause at 252.232–7009, Mandatory Payment by Government-wide Commercial Purchase Card, as prescribed in 232.1110.

(I) Use the clause at 252.232–7010, Levies on Contract Payments, as prescribed in 232.7102.

(J) Use the clause at 252.232–7011, Payments in Support of Emergencies and Contingency Operations, as prescribed in 232.908.

(K) Use the clause at 252.246–7003, Notification of Potential Safety Issues, as prescribed in 246.371.

(L) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(e).]

(M) Use the clause at 252.247–7027, Riding Gang Member Requirements, as prescribed in 247.574(f).

(v) Use the clause at 252.232–7009, Mandatory Payment by Government-wide Commercial Purchase Card, as prescribed in 232.1110.

(vi) Use the clause at 252.211–7003, Item Identification, as prescribed at 211.274–4.

(vii) Use the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402–4.

(viii) Use the clause at 252.225–7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225–7040.

(ix) Use the clause at 252.211–7006, Radio Frequency Identification, as prescribed in 211.275–3.

(x) Use the clause at 252.232–7010, Levies on Contract Payments, as prescribed in 232.7102.

(xi) Use the clause at 252.246–7003, Notification of Potential Safety Issues, as prescribed in 246.371.

(xii) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(e).

(xiii) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003–5(b).

(xiv) Use the clause at 252.232–7011, Payments in Support of Emergencies and Contingency Operations, as prescribed in 232.908.

(xv) Use the clause at 252.247–7027, Riding Gang Member Requirements, as prescribed in 247.574(f).

[60 FR 61595, Nov. 30, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 212.301, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

212.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(c) *Tailoring inconsistent with customary commercial practice.* The head of the contracting activity is the approval authority within the DoD for waivers under FAR 12.302(c).

Subpart 212.5—Applicability of Certain Laws to the Acquisition of Commercial Items

212.503 Applicability of certain laws to executive agency contracts for the acquisition of commercial items.

(a) The following laws are not applicable to contracts for the acquisition of commercial items: